TING SING HAT

v.

KEJURUTERAAN AWAM CANG CENG (M) SDN. BHD. & 4 ORS.

HIGH COURT SABAH & SARAWAK, MIRI
TUAN RICHARD MALANJUM J
[ORIGINATING PETITION NO. MR. 1 OF 1993]
23 MAY 1995

PRACTICE & PROCEDURE: *Preliminary objection - Affidavit verifying petition - Failure to comply with O. 41 r. 1(5) RHC 1980 - Whether fatal.*

The respondents in this case made two preliminary objections at the hearing of the petition in that the petition should be struck out (1) as it failed to comply with the Companies Winding-up Rules 1972 since the affidavit verifying the petition did not have the copy of the petition filed in Court annexed to it, or alternatively, (2) even if the petition did not come under the Winding-up Rules, it should be struck out as the affidavit verifying its content did not comply with O. 41 r. 1(5) RHC 1980. The first objection was however disposed of as irrelevant since it was clear that the petition was filed under the RHC and therefore the Companies Winding-up Rules was not applicable. The Court was then left to decide on the issue as to whether the petition should be struck out on the ground that the affidavit did not comply with O. 41 RHC.

Held:

[1] There is no requirement under O. 88 r. 5 RHC or under O. 9 RHC that in order for a petition to be regular it must be properly verified or supported by an affidavit in filing. A petition on its own is regular and that its evidential aspect is another matter. Any defect in the latter does not necessarily affect the regularity of the petition. Order 2 should be considered instead in dismissing the petition or the said affidavit.

[2] Save for the absence of the signature of the solicitors for the petitioner on the petition annexed to the said affidavit and the different date given on its indorsement, there was no other discrepancies between the affidavit and the petition. The annexed petition save for the two discrepancies was a copy of the petition filed in Court and that being the case, by annexing it to the verifying affidavit should be adequate.

[Preliminary objection overruled; hearing of petition to proceed as scheduled]

Cases referred to:
Lai Kim Loi v. Datuk Lai Fook Kim & Anor. [1985] 1 SCR 624 ***(refd)***
Re United Iron Mining Co. Ltd. [1970] 1 MLJ 105 ***(foll)***
Ooi Thean Chuan v. Banque National de Paris [1992] 2 MLJ 526 ***(refd)***

Legislation referred to:
Companies Act, s. 181
Companies Winding-up Rules, 1972
Rules of the High Court, O. 9, 41 r. 1(5), 88

Other source referred to:
Atkin's Court Forms, Vol. 31 (1993 Issue) p. 439, para. 4, p. 443, para. 8

For the petitioner - Fabian Lim; M/s. Fabian A.H. Lim
For the respondents - Joseph Tang; M/s. Tang & Co.

JUDGMENT

Richard Malanjum J:

The hearing of this originating petition (hereinafter referred to as "the petition") is scheduled to be on 31 July 1995. However during the last mention of this case learned Counsel for the respondents intimated that he had a preliminary objection to make. Accordingly I heard the objection on 17 March 1995.

The gist of the preliminary objection of the learned Counsel for the respondents is as follows:

(i) that the petition should be struck out as it did not comply with the Companies Winding-up Rules 1972 (hereinafter referred to as "the Winding-up Rules") since the affidavit verifying the petition did not have the copy of the petition filed in Court annexed to it;

(ii) alternatively, even if the petition does not come under the Winding-up Rules, it should be struck out as the affidavit verifying its content does not comply with O. 41 r. 1(5) of the Rules of the High Court 1980 (hereinafter referred to as "RHC").

Learned Counsel for the respondent made a lengthy submission on item (i) above which initially arose my anxiety. However, in his submission learned Counsel for the petitioner took the stand that the petition was filed under the RHC (more specifically under O. 88 RHC) and not under the Winding-up Rules. As such item (i) of the preliminary objection become irrelevant. Anyway, it would not have succeeded. It is clear in the petition that it is filed under the RHC and even the number given by the Court Registry is for originating petition and not for companies (winding-up) as in the case of *Lai Kim Loi v. Datuk Lai Fook Kim & Anor.* [1985] 1 SCR 624.

Indeed in a petition under s. 181 of the Companies Act 1965 (hereinafter called "the Act") the applicable rule of procedure to observe should be the RHC and not the Winding-up Rules. I am fortified in my view by what was said Chang Min Tat J (as he then was) in the case of *Re United Iron Mining Co. Ltd.* [1970] 1 MLJ 105 at p. 106:

> ... Where a petition is made under s. 181 for remedies for the relief of oppression of minorities and a prayer for a winding-up is only made in the alternative, I do not think, with respect, that such a petition can properly be called a winding-up. I therefore take the view that in a petition under s. 181, the discretion under s. 221(2)(e) to allow for amendments or for withdrawal with liberty to file a fresh petition cannot be extended to it, and that the Companies (Winding-up) Rules 1946 did not apply.

In that case the learned Judge ruled that the discretion of the High Court under the then Rules of the Supreme Court was available to the applicant to apply for leave to withdraw his petition.

I now come to the alternative item (ii) of the preliminary objection.

Order 41 r. 1(5) RHC reads:

> Every affidavit must be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.

And learned Counsel for the respondents said that the affidavit filed in connection with the petition in this case did not meet such requirement.

For clarity, it may be appropriate to reproduce the affidavit in question namely, the affidavit of the petitioner affirmed on 13 October 1993 (hereinafter referred to as "the said affidavit"). After the title of the action, it proceeded as follows:

Affidavit Verifying Petition

I, Ting Sing Hat (NRIC No. K691174) of full age, a Malaysian citizen and having an address at 03-06, St. Patrick's View, 56, St. Patrick Road, Singapore 1542, do hereby solemnly and sincerely affirm and say as follows:

1. I am the petitioner above.

2. Such of the statement in the petition now produced and shown to me and marked as Exhibit A as relate to the acts and deeds of the petitioner are true and such of the statements as relate to the acts and deeds of any other person or persons I believe to be true.

Thereafter followed by the jurat and the signatures of the deponent and the attestator. But the important question to consider is whether the petition should be struck out on the ground that the said affidavit did not comply with O. 41 RHC. With respect, I do not think so. There is no requirement under O. 88 r. 5 or for that matter under O. 9 RHC that in order for a petition to be regular it must be properly verified or supported by an affidavit on filing. A petition on its own is regular and that its evidential aspect is another matter (See: *Atkin's Court Forms* Vol. 31 (1993 Issue) p. 439 para. 4 and p. 443 para. 8). Any defect in the latter (including affidavit evidence) does not necessarily affect the regularity of the petition. That should therefore dispose of the alternative objection of the learned Counsel for the respondents.

In the event that I am wrong in the foregoing, it is also my view and I so rule that save for the absence of the signature of the solicitors for the petitioner on the petition annexed to the said affidavit and the different date given on its indorsement, I found no other discrepancies even after a close scrutiny and comparison between it and the petition. I have no doubt that the annexed petition save for the two discrepancies is a copy of the petition filed in Court. And that being the case, by annexing it to the verifying affidavit should be adequate. (See: *Ooi Thean Chuan v. Banque National de Paris* [1992] 2 MLJ 526.

In refusing to accede to the request of the learned Counsel for the respondents I also bear in mind that since it is the RHC which applies O. 2 thereof should be considered instead of dismissing the petition or the said affidavit *in limine*.

Before concluding, there is one matter which I would like to mention. I note that pursuant to the summons for direction dated 30 October 1993 (encl. 6) taken out by the petitioner an order was made without the objection of the respondents that the said affidavit be used in evidence at the hearing of the petition. But learned Counsel for the respondents seems to have now changed his stand. In view of that and aside from what I have stated earlier in this ruling I think it is only fair that the question of whether or not to admit the said affidavit should only be determined at the hearing of the petition. This would enable both parties to address the Court as to what extent they are bound by the previous order made. It would also allow the petitioner to consider whether to use in evidence the said affidavit as it stands or to make the necessary application to enable its admission.

For the foregoing reasons I therefore overrule the preliminary objection of the learned Counsel for the respondents and hereby order that the hearing of the petition is to proceed as scheduled.